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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Jeanne Burns, individually and on behalf)	CASE NO: 14-cv-00749-JAH-DHB
of all others similarly situated,)	
) Hon. John A. Houston
Plaintiffs,)	Courtroom 13B
)
v.)	PLAINTIFFS' MEMORANDUM
	OF POINTS AND AUTHORITIES
Tristar Products, Inc., a New Jersey)	IN OPPOSITION TO
Corporation, and Does 1 through 50.)	DEFENDANT'S MOTION TO
	DISMISS COMPLAINT
Defendant.)	
	Hearing Date: June 16, 2014
	Hearing Time: 2:30 p.m.

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I. INTRODUCTION

Tristar Products, Inc. (“Defendant”) marketed the Flex-Able Hose as a durable, strong garden hose that was built to last a long time. The product, however, does not last a long time, and is not built strong. In fact, it would often rupture shortly after purchase. Plaintiff is not the only consumer to experience this problem. As detailed in Plaintiff’s complaint filed on January 9, 2014, seeking relief under California law, the internet is full of complaints from consumers complaining about the hose. *See Complaint* at ¶ 21 (“all 4 hoses sprung a leak immediately upon using. Customer service no help. They won’t reimburse us. We are in our mid-80’s feel completely victimized.”) And just recently, another class action was filed on April 25, 2014 in the United States District Court For the District of New Jersey, Newark Division, *Winstanley v. Tristar Products, Inc.*, Case No. 2:14-CV-02657-JLL.JAD.

In Defendant’s *Motion to Dismiss the Complaint* (“Motion”) made pursuant to 12(b)(1)¹, Defendant requests this Court dismiss Plaintiff’s injunctive relief claims brought to prevent Defendant from continuing to market and sell its defective hose. As shown below, there is currently a split of authority with respect to the availability of injunctive relief in federal court for plaintiffs who bring class actions based upon violations of California’s consumer protection laws. Given that Plaintiff clearly pled Article III standing, including the loss of money, and California’s strong public

¹ It should be noted that Defendant’s motion moves to dismiss the complaint, but the motion is focused on dismissing plaintiff’s injunctive claims. As such, Plaintiff will address the injunctive claims. Plaintiff expressly reserves the right to challenge dismissal of the entire complaint.

1 policy of protecting consumers from fraudulently and deceptively marketed goods,
 2 Plaintiff requests that the Court apply the reasoning set forth in *Henderson v Gruma*
 3 *Corporation*, CV 10-04173 AHM (AJWX) (C.D. Cal. April 11, 2011), which applies
 4 a broader reading of Article III standing, allowing for injunctive relief in the context
 5 of false advertising based class actions, and deny Defendant's *Motion* in its entirety.
 6 And in the alternative, should the Court decline to apply the reasoning in *Henderson*,
 7 Plaintiff respectfully requests that her injunctive claims be remanded to the Superior
 8 Court of California, County of San Diego, where this action was originally filed.
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12 II. ARGUMENT

13 A. GIVEN THE SPLIT IN THE DISTRICT COURTS WITH RESPECT 14 TO THE ISSUE OF THE AVAILABILITY OF INJUNCTIVE RELIEF 15 BASED UPON ARTICLE III, THE COURT SHOULD FOLLOW THE 16 REASONING SET FORTH IN *HENDERSON* AND DENY 17 DEFENDANT'S MOTION

18 1. Plaintiff Has Suffered Injury In Fact Sufficient To Confer Article 19 III Standing

20 In order to have standing, under Article III, a plaintiff must "have suffered
 21 injury in fact that is traceable to defendant's conduct, and a favorable ruling will
 22 address the injury". *See Lujan. v. Defenders of Wildlife* 504 U.S. 555, 560-561
 23 (1992).

24 Defendant in its *Motion* implicitly concedes that Plaintiff has properly pled
 25 "injury in fact" with respect to her claims involving both damages and equitable
 26 relief. As detailed in Plaintiff's complaint, she suffered injury in the fact, in the form
 27 of lost money. Plaintiff was deceived into purchasing a defectively designed garden
 28

1 hose that was mass marketed to the general public. Complaint at ¶ 21 (“Had Plaintiff
2 known that the Flex-Able Hose was a flimsy hose with a propensity to leak and
3 rupture, she would not have purchased the product. As such, Plaintiff lost money and
4 suffered injury-in-fact as a result of purchasing Defendant’s product.”) As shown
5 below, Plaintiff should be able to represent the class and seek redress in the form of
6 an injunction from this Court to stop Defendant’s unlawful and fraudulent marketing
7 of the Flex-Able Hose.
8

10 **2. Under the Court’s Ruling In *Henderson*, A Plaintiff’s Knowledge Of**
11 **Defendant’s Deceptive Business Practices Does Not Negate a**
12 **Plaintiff’s Article III Standing to Pursue Injunctive Relief.**

13 It should be noted that there is currently a split amongst the federal district
14 courts within California with respect to a plaintiff’s ability to seek injunctive relief
15 after becoming aware of a defendant’s fraudulent and deceptive conduct in a false
16 advertising case. Plaintiff believes that the Court should follow the reasoning set forth
17 in *Henderson*, which allows a representative plaintiff to seek injunctive relief, despite
18 knowledge of the falsity of a defendant’s claims, so as to effectuate state consumer
19 protection laws, and to assert the rights of the class to injunctive relief as well as the
20 subsequent cases citing it. *See Cabral v. Supple, LLC, et al.* No. EDCV-12-00085-
21 MWF (C.D Cal. Sep 19, 2012); *Larsen v. Trader Joe’s* 2012 WL 5458396 (N.D Cal.
22 June 14, 2012).
23

24 It also should be noted that California has a long history of protecting
25 consumers from unfair and fraudulent business practices. “The UCL prohibits, and
26
27
28

1 provides civil remedies for, unfair competition, which it defines as “any unlawful,
 2 unfair or fraudulent business act or practice.” § 17200. Its purpose “is to protect both
 3 consumers and competitors by promoting fair competition in commercial markets for
 4 goods and services.” *Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949, 119Cal.Rptr.2d
 5 296, 45 P.3d 243; see *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 852, 70
 6 Cal.Rptr.3d 466. In service of that purpose, the Legislature framed the UCL's
 7 substantive provisions in “ ‘broad, sweeping language’ ” *Cel-Tech Communications,*
 8 *Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 181, 83
 9 Cal.Rptr.2d 548, 973 P.2d 527; see also *Bank of the West v. Superior Court* (1992) 2
 10 Cal.4th 1254, 1266, 10 Cal.Rptr.2d 538, 833 P.2d 545 [“The Legislature intended this
 11 ‘sweeping language’ to include “‘anything that can properly be called a business
 12 practice and that at the same time is forbidden by law.” ’ ”]) and provided “courts
 13 with broad equitable powers to remedy violations” *ABC Internat. Traders, Inc. v.*
 14 *Matsushita Electric Corp.* 1997) 14 Cal.4th 1247, 1270, 61 Cal.Rptr.2d 112, 931 P.2d
 15 290. **884 The state's false advertising law § 17500 et seq. is equally comprehensive
 16 within the narrower field of false and misleading advertising.” *Kwikset v. Superior*
 17 *Ct.* 51 Cal4th 310, 320 (Cal. 2011).

18 In *Henderson*, the Court addressed the threshold issue of whether a plaintiff's
 19 knowledge of a defendant's fraudulent conduct precluded a plaintiff from seeking
 20 injunctive relief under California's Unfair Competition Law, False Advertising Law,
 21 and Consumer Legal Remedies Act. In *Henderson*, the plaintiff filed a class action

1 against the defendant based upon false and misleading statements made by
2 defendants in connection with its advertising of guacamole chips that were advertised
3 as, among other things, “all natural, and “O g transfat.” In her complaint, with respect
4 to injury, the plaintiff alleged: “she would not have purchased the two products at the
5 price they paid absent the advertisements with the alleged misstatements. FAC ¶
6 87.... “Plaintiffs lost money as a result of Gruma's deception in that Plaintiffs did not
7 receive what they had paid for.” *Henderson* at p. *4.
8

9 The Court found these allegations sufficient to confer Article III standing:
10

11 “Here, Plaintiffs have met the injury-in-fact requirement for standing under
12 Proposition 64 and therefore, in addition, under that prong of Article III
13 standing. They alleged that they paid more for Mission Guacamole and
14 Mission Bean Dip, and would have paid less for the products, if they had
15 not been misled by the allegedly false and misleading labeling. FAC ¶¶ 10,
16 86–87. Plaintiffs allege they would not have purchased the two products at
17 the price they paid absent the advertisements with the alleged
18 misstatements. FAC ¶ 87. Plaintiffs also allege that instead of receiving
19 products that were free of artificial trans fat, or receiving authentic
20 guacamole, they purchased artificial substances containing artificial trans
21 fats that could “raise [] their cholesterol and damage[] the cells in their
22 heart and arteries.” FAC ¶ 91. *See also* FAC ¶¶ 89–90, 92. “Plaintiffs lost
money as a result of Gruma's deception in that Plaintiffs did not receive
what they had paid for.” FAC ¶ 93.” *Henderson* at p. *4.

23 In reaching its holding, the Court considered the injury alleged by plaintiff in
24 the complaint, and placed added emphasis on the policy of California’s consumer
25 protection laws. In doing so, it held:
26

27 “First, Plaintiffs have sufficiently demonstrated actual injury, as discussed
28 above. If the Court were to construe Article III standing for FAL and UCL

1 claims as narrowly as the Defendant advocates, federal courts would be
2 precluded from enjoining false advertising under California consumer
3 protection laws because a plaintiff who had been injured would always be
4 deemed to avoid the cause of the injury thereafter (“once bitten, twice
5 shy”) and would never have Article III standing. *See, e.g., Fortune v.*
6 *American Multi-Cinema, Inc.*, No. CV 10–5551, 2002 WL 32985838, *7
7 (C.D.Cal. Oct.22, 2002) (“If this Court rules otherwise [and does not find
8 standing], like defendants would always be able to avoid enforcement of
9 the ADA. This court is reluctant to embrace a rule of standing that would
10 allow an alleged wrongdoer to evade the court's jurisdiction so long as he
11 does not injure the same person twice.”) (citing *Parr v. L & L Drive-Inn*
12 *Restaurant*, 96 F.Supp.2d 1065, 1080 (D.Hawaii 2000) (Yamashita,
13 M.J.)).” *Henderson* at p. *7.

14 In reaching its finding that knowledge was irrelevant with respect to standing
15 with regard to injunctive relief, the Court held:

16 “While Plaintiffs may not purchase the same Gruma products as they
17 purchased during the class period, because they are now aware of the true
18 content of the products, to prevent them from bringing suit on behalf of a
19 class in federal court would surely thwart the objective of California's
20 consumer protection laws. That objective is “to protect both consumers *and*
21 *competitors* by promoting fair competition in commercial markets for
22 goods and services.” *See Kwikset*, 51 Cal.4th at 344, 120 Cal.Rptr.3d 741,
23 246 P.3d 877 (emphasis in the original). Defendant has not presented
24 evidence or even alleged that it has removed its allegedly misleading
25 advertising from its products. With such advertising remaining on
26 supermarket shelves, Plaintiffs, as representatives of a class, should be
27 entitled to pursue injunctive relief on behalf of all consumers in order to
28 protect consumers from Defendant's alleged false advertising.” *Henderson*
at p. *8.

29 In this case, Defendant has been notified several times that it is selling a
30 defective product, as demonstrated by the online complaints referenced in Plaintiff's
31 Complaint, the filing of this action and the recent filing of the *Winstanley* action.

1 Nonetheless, Defendant continues to market and sell its garden hoses to the general
2 public. Nothing in Defendant's Notice of Removal or this *Motion* indicates that it has
3 stopped making misleading representations about the product or disclosed the
4 inherent defective nature of the product, nor attempted to provide the remedial relief
5 sought in Plaintiff's CLRA letter or complaint. It is clear from Defendant's *Motion*
6 that Defendant is attempting to circumvent California's State consumer protection
7 laws by bringing this *Motion*. Like in *Henderson* above, the Court should deny the
8 *Motion* and allow Plaintiff the opportunity to seek injunctive relief for her injuries as
9 well as on behalf of the class' ongoing injuries. Defendant should not be allowed to
10 remove Plaintiff's complaint, and then file this *Motion* to prevent redress for Plaintiff
11 and the Class' injuries.

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16 **B. SHOULD THE COURT DECLINE TO APPLY THE REASONING IN**
17 ***HENDERSON*, IT SHOULD REMAND PLAINTIFF'S INJUNCTIVE**
18 **CLAIMS TO STATE COURT PURSUANT TO FRCP SECTION 1447**

19 It should be noted that Defendant brought its *Motion* under FRCP Section
20 12(b)(1). As such, this *Motion* seeks to dismiss Plaintiff's injunctive claims based
21 upon a lack of subject matter jurisdiction. Federal courts are courts of limited
22 jurisdiction, and as such have an obligation to dismiss claims for which they lack
23 subject-matter jurisdiction. *Demarest v. United States*, 718 F.2d 964, 965 (9th
24 Cir.1983). Because the issue of standing pertains to the subject-matter jurisdiction of
25 a federal court, motions raising lack of standing are properly brought under *Federal*
26 *Rule of Civil Procedure* 12(b)(1). The party asserting jurisdiction bears the burden of
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28

1 establishing subject matter jurisdiction on a motion to dismiss for lack of subject
2 matter jurisdiction.” See *Simpson v. California Pizza Kitchen, Inc.*, Case No. 13–cv–
3 164 JLS (JMA) (S.D. Cal. 2013) p. *1.

4
5 Should the Court find that it is without subject matter jurisdiction, based upon
6 Article III, Plaintiff respectfully requests remand of her injunctive claims pursuant to
7 FRCP Section 1447. See *Cattie v. Wal-Mart Stores, Inc.* 504 F.Supp.2d 939, 951–
8 952(S.D.Cal. 2007) (“If this Court lacks jurisdiction to enjoin Defendants or give
9 declaratory relief, consumers in Plaintiff’s position may yet be able to split their
10 claim and seek injunctive relief in state Court. See *Deitz*, 2006 WL 3782902, slip op
11 at *4).

12
13
14 FRCP Section 1447(c) in relevant part states:

15
16 “...If at any time before final judgment it appears that the district court
17 lacks subject matter jurisdiction, the case shall be remanded. An order
18 remanding the case may require payment of just costs and any actual
19 expenses, including attorney fees, incurred as a result of the removal. A
20 certified copy of the order of remand shall be mailed by the clerk to the clerk
21 of the State court. The State court may thereupon proceed with such case.”

22
23 As shown above from the text of FRCP Section 1447(c), the Court clearly has the
24 authority to remand Plaintiff’s injunctive claims and should this Court find that is
25 does not have jurisdiction, Plaintiff respectfully request remand pursuant to 1447(c).

26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427 428 429 430 431 432 433 434 435 436 437 438 439 440 441 442 443 444 445 446 447 448 449 450 451 452 453 454 455 456 457 458 459 460 461 462 463 464 465 466 467 468 469 470 471 472 473 474 475 476 477 478 479 480 481 482 483 484 485 486 487 488 489 490 491 492 493 494 495 496 497 498 499 500 501 502 503 504 505 506 507 508 509 510 511 512 513 514 515 516 517 518 519 520 521 522 523 524 525 526 527 528 529 530 531 532 533 534 535 536 537 538 539 540 541 542 543 544 545 546 547 548 549 550 551 552 553 554 555 556 557 558 559 560 561 562 563 564 565 566 567 568 569 570 571 572 573 574 575 576 577 578 579 580 581 582 583 584 585 586 587 588 589 590 591 592 593 594 595 596 597 598 599 600 601 602 603 604 605 606 607 608 609 610 611 612 613 614 615 616 617 618 619 620 621 622 623 624 625 626 627 628 629 630 631 632 633 634 635 636 637 638 639 640 641 642 643 644 645 646 647 648 649 650 651 652 653 654 655 656 657 658 659 660 661 662 663 664 665 666 667 668 669 670 671 672 673 674 675 676 677 678 679 680 681 682 683 684 685 686 687 688 689 690 691 692 693 694 695 696 697 698 699 700 701 702 703 704 705 706 707 708 709 710 711 712 713 714 715 716 717 718 719 720 721 722 723 724 725 726 727 728 729 730 731 732 733 734 735 736 737 738 739 740 741 742 743 744 745 746 747 748 749 750 751 752 753 754 755 756 757 758 759 760 761 762 763 764 765 766 767 768 769 770 771 772 773 774 775 776 777 778 779 780 781 782 783 784 785 786 787 788 789 790 791 792 793 794 795 796 797 798 799 800 801 802 803 804 805 806 807 808 809 810 811 812 813 814 815 816 817 818 819 820 821 822 823 824 825 826 827 828 829 830 831 832 833 834 835 836 837 838 839 840 841 842 843 844 845 846 847 848 849 850 851 852 853 854 855 856 857 858 859 860 861 862 863 864 865 866 867 868 869 870 871 872 873 874 875 876 877 878 879 880 881 882 883 884 885 886 887 888 889 890 891 892 893 894 895 896 897 898 899 900 901 902 903 904 905 906 907 908 909 910 911 912 913 914 915 916 917 918 919 920 921 922 923 924 925 926 927 928 929 930 931 932 933 934 935 936 937 938 939 940 941 942 943 944 945 946 947 948 949 950 951 952 953 954 955 956 957 958 959 960 961 962 963 964 965 966 967 968 969 970 971 972 973 974 975 976 977 978 979 980 981 982 983 984 985 986 987 988 989 990 991 992 993 994 995 996 997 998 999 1000III. CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court deny Defendant’s *Motion* in its entirety. And in the alternative, should the Court grant Defendant’s motion, Plaintiff respectfully requests that her injunctive relief claims be

1 remanded to the Superior Court of California, County of San Diego where this action
2 was originally filed.
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5 Date: June 2, 2014

Respectfully submitted,

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